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Casenotes: Trusts — Spendthrift Provisions — Inter Vivos Transfer of Grantor-Spouse's Interest in Tenancy by Entirety and Subsequent Testamentary Creation of Spendthrift Trust by Grantee-Spouse in Favor of Grantor-Spouse Held to Be Valid against Latter's Creditors. *Watterson v. Edgerly*, 40 Md. App. 230, 388 A.2d 934 (1978)

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TRUSTS — SPENDTHRIFT PROVISIONS — INTER VIVOS TRANSFER OF GRANTOR-SPOUSE'S INTEREST IN TENANCY BY ENTIRETY AND SUBSEQUENT TESTAMENTARY CREATION OF SPENDTHRIFT TRUST BY GRANTEE-SPOUSE IN FAVOR OF GRANTOR-SPOUSE HELD TO BE VALID AGAINST LATTER'S CREDITORS. *WATTERSON v. EDGERLY*, 40 Md. App. 230, 388 A.2d 934 (1978).

Maryland has long recognized spendthrift trust provisions by which a settlor may designate that the trust interest he creates be paid exclusively to the beneficiary, rendering the beneficiary's life estate inalienable by the beneficiary and protected from his creditors.¹ This results in an assignment of priority making the settlor's right to determine the recipient of his gratuitous conveyance superior to the right of creditors to have their debts satisfied out of their debtors' assets.² In the recent case of *Watterson v. Edgerly*,³ the Maryland Court of Special Appeals combined this inalienable characteristic of the spendthrift trust with the protection from

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1. See, e.g., *Medwedeff v. Fisher*, 179 Md. 192, 17 A.2d 141 (1941); *Michaelson v. Sokolove*, 169 Md. 529, 182 A. 458 (1936); *Johnson v. Stringer*, 158 Md. 315, 148 A. 447 (1930); *Plitt v. Yakel*, 129 Md. 464, 99 A. 669 (1916); *Safe Deposit & Trust Co. v. Independent Brewing Ass'n*, 127 Md. 463, 96 A. 617 (1916); *Jackson Square Loan & Sav. Ass'n v. Bartlett*, 95 Md. 661, 53 A. 426 (1902); *Brown v. McGill*, 87 Md. 161, 39 A. 613 (1898).
 2. See, e.g., *Nichols v. Eaton*, 91 U.S. 716, 725 (1875); *Smith v. Towers*, 69 Md. 77, 14 A. 497 (1888) (dissenting opinion of Alvey, C.J., appears at 15 A. 92); E. GRISWOLD SPENDTHRIFT TRUSTS § 29 (2d ed. 1947).

Spendthrift trusts are a creation of American common law and were held invalid by English courts as unjustifiable restraints upon the alienation of property. See, e.g., *Green v. Spicer*, 1 R. & My. 395, 39 Eng. Rep. 153 (1830). This type of trust first appeared in Pennsylvania in the early nineteenth century, a time when the Pennsylvania courts habitually refused to recognize any equitable right of the creditor to reach the debtor/beneficiary's trust income. The United States Supreme Court, in dicta, later supported the position taken by the Pennsylvania courts. *Nichols v. Eaton*, 91 U.S. 716, 725 (1875).

Not all jurisdictions in this country recognize spendthrift trusts. In many of the jurisdictions where they have been accepted, their effect has been limited by case decisions or legislative enactments. In Maryland, for example, a spendthrift provision will not prevent a wife or dependent of the spendthrift beneficiary from reaching the trust income for support or alimony. See, e.g., *Safe Deposit & Trust Co. v. Robertson*, 192 Md. 360, 65 A.2d 292 (1949). Nor will a spendthrift provision inhibit the attachment of a spendthrift beneficiary's income interest by the federal government in collection of the beneficiary's delinquent taxes. See, e.g., *Mercantile Trust Co. v. Hofferbert*, 58 F. Supp. 701 (D. Md. 1944). The Restatement would expand the list of claimants who could reach a beneficiary's interest in a spendthrift trust to include suppliers of necessary services to the beneficiary and those whose services preserve or benefit the trust. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

For a history of the American treatment of the spendthrift trust and its present operative effect within the various states, see generally G. BODGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 222-27 (rev. 2d ed. 1979); E. GRISWOLD SPENDTHRIFT TRUSTS (2d ed. 1947).

3. 40 Md. App. 230, 388 A.2d 934 (1978).

creditors afforded property held in a tenancy by the entirety. The court held that a husband faced with judgment creditors could convey his interest in real property held by the entirety to his wife, who in turn could validly create a testamentary spendthrift trust in favor of the husband in order to shield the husband's life estate from his creditors upon the wife's death.

I. FACTUAL BACKGROUND

On January 23, 1976, Earl Watterson was faced with several judgment creditors and, without consideration, he conveyed to his wife his interest in a parcel of real property held as tenants by the entirety. The next day Watterson's wife executed a will, establishing a spendthrift trust for the support of Watterson during his life. The trust corpus consisted partially of the real property conveyed by Watterson to his wife the day before. Sixty-one days later, Mrs. Watterson died.

Edgerly, one of Watterson's judgment creditors, filed a bill of complaint in the Circuit Court for Montgomery County, requesting that the court declare the conveyance from Watterson to his wife fraudulent as to Watterson's creditors, and the spendthrift provision of the trust invalid to the extent of Watterson's contribution to the trust corpus. Additionally, Edgerly sought a determination that Watterson's life interest in the trust was subject to execution by his creditors.⁴

Based upon a stipulation of facts,⁵ the circuit court found Watterson's conveyance to his wife to be fraudulent as to his creditors,⁶ and determined that Watterson was, in effect, the settlor of the spendthrift trust created for his benefit. Finding the spendthrift provision invalid, the court held that Watterson's creditors could reach his interest under the trust.⁷

Although the stipulated facts contained no reference to Watterson's intent or knowledge at the time of the conveyance to his wife, the court found that Watterson was aware of his wife's terminal illness, and that this knowledge, coupled with Watterson's insolvency and the lack of consideration supporting the transfer, made

4. Brief for Appellant, *Watterson v. Edgerly*, 40 Md. App. 230, 388 A.2d 934 (1978), Record Extract, E.3.

5. *Watterson v. Edgerly*, 40 Md. App. 230, 233, 388 A.2d 934, 937 (1978).

6. See, e.g., *Ressmeyer v. Norwood*, 117 Md. 320, 83 A. 347 (1912) (mortgage made from husband and wife to wife alone held invalid for want of bona fide consideration); *Myers v. King*, 42 Md. 65 (1875) (gift of \$500 by insolvent husband to wife held fraudulent as to husband's creditors).

7. Brief for Appellant, *Watterson v. Edgerly*, 40 Md. App. 230, 388 A.2d 934, Record Extract, E.8. See also RESTATEMENT (SECOND) OF TRUSTS §156 (1959); G. BOGERT, TRUSTS AND TRUSTEES §223 (rev. 2d ed. 1979).

the conveyance an act "done with the intent to hinder, delay, or defraud creditors."⁸ From this adverse finding, Watterson sought appellate review in the Court of Special Appeals.

II. THE COURT OF SPECIAL APPEALS' OPINION

The Court of Special Appeals preliminarily recognized the validity of spendthrift trusts⁹ and the accompanying prohibition against a person creating a spendthrift trust for his own benefit.¹⁰ Noting that the case was one of first impression, the court phrased the issue as "whether a husband may convey his interest in real property, owned by the husband and wife as tenants by the entirety, to his wife, and [whether] she in turn, by testamentary disposition, [may] create a valid spendthrift trust so as to shield the husband from his judgment creditors."¹¹

After reviewing the facts, the court refused to accept the circuit court's conclusion that Watterson's intent in conveying his interest in the property was to hinder or defraud his creditors.¹² Labeling this conclusion "a major premise of the trial court's reasoning,"¹³ the opinion discounted the importance of Watterson's intent. The court cited *Hertz v. Mills*¹⁴ as permitting the transfer of property held by the entirety from either spouse to the sole ownership of the other, even if the transfer is motivated by an intent to "prevent the enforcement of a judgment against the grantor should he survive the

8. Brief for Appellant, *Watterson v. Edgerly*, 40 Md. App. 230, 388 A.2d 934 (1978), Record Extract, E.8.

9. 40 Md. App. at 231, 388 A.2d at 935-36. See also *Medwedeff v. Fisher*, 179 Md. 192, 17 A.2d 141 (1941); *Smith v. Towers*, 69 Md. 77, 14 A. 497 (1888) (dissenting opinion of Alvey, C. J., appears at 15 A. 92).

10. 40 Md. App. at 237, 388 A.2d at 936. The first indication of this prohibition against self-serving spendthrift trusts appeared in *Nichols v. Eaton*, 91 U.S. 725 (1875), in which the Supreme Court limited the establishment of testamentary spendthrift trusts to those created by a testator "who gives, without any pecuniary return, who gets nothing of property value from the donee." *Id.* at 727. See generally RESTATEMENT (SECOND) OF TRUSTS § 156 (1959); A. SCOTT, THE LAW OF TRUSTS § 156 (3d ed. 1967); see also *Brillhart v. Mish*, 99 Md. 447, 58 A. 28 (1904); *Brown v. McGill*, 87 Md. 161, 39 A. 613 (1898); *Warren v. Rice*, 66 Md. 436, 8 A. 84 (1887).

11. 40 Md. App. at 232, 388 A.2d at 936.

12. *Id.* at 234, 388 A.2d at 937.

13. *Id.* at 235, 388 A.2d at 938.

14. 166 Md. 492, 171 A. 709 (1934). *Hertz* held that the judgment creditor of an individual spouse could not be deemed to have a right of execution on the entirety that was suspended during the life of the unencumbered spouse, because any such valid but suspended right of execution would prevent the unencumbered spouse from passing good title. Thus, the judgment creditor of an individual spouse had no interest in the entirety and no standing to complain of its conveyance, even if such a conveyance acted to remove the debtor-spouse's interest from the creditor's future right of execution. See also *Ades v. Caplan*, 132 Md. 66, 103 A. 94 (1918); *Jordan v. Reynolds*, 105 Md. 288, 66 A. 37 (1907).

grantee."¹⁵ Distinguishing the two Maryland cases cited by the trial court,¹⁶ which held interspousal transfers invalid if designed for the purpose of defrauding creditors, the opinion pointed out that neither of those cases involved the transfer of real property held in a tenancy by the entirety.¹⁷ Emphasizing the absence of any Maryland precedent to the contrary, the court cited dicta in Maryland cases supporting the contention that no consideration is necessary to validate the transfer of property held by the entirety to the sole ownership of one spouse.¹⁸

The court briefly traced the history of tenancies by the entirety, reiterating that neither spouse can affect the tenancy by individual action,¹⁹ and that a judgment against either spouse does not give the judgment creditor an enforceable interest in the entirety.²⁰ Citing a

15. 40 Md. App. at 235, 388 A.2d at 938. *Accord*, *Hertz v. Mills*, 166 Md. 492, 171 A. 709 (1934). The court also cited *Van Royen v. Lacey*, 266 Md. 649, 296 A.2d 426 (1972), as support for this rule. In *Van Royen* the Court of Appeals held that the defendant-appellees were estopped by their pleadings from raising on appeal the contention that the land sought by a judgment creditor was partially held in a tenancy by the entireties. In dicta the Court of Appeals affirmed the *Hertz* holding. 266 Md. at 651, 296 A.2d at 427.

16. *See* note 6 *supra*.

17. 40 Md. App. at 236, 388 A.2d at 938.

18. *Id.* at 235, 388 A.2d at 938. *See also* *Valentine v. Seiss*, 79 Md. 187, 28 A. 892 (1894); *Clark v. Wooton*, 63 Md. 113 (1885).

19. *See, e.g.*, *McCubbin v. Stanford*, 85 Md. 378, 37 A. 214 (1897). In *McCubbin*, a husband mortgaged land that was owned by the husband and wife as tenants by the entirety, upon which the purchaser of the mortgage attempted to foreclose. The court held that because one tenant of the entirety could not alienate the property in a manner which would infringe the rights of the other tenant, the mortgage by the husband alone could not affect the property rights of his wife. The rationale for the decision in *McCubbin* is based upon the definition of the tenancy by the entirety found in *Brewer v. Bowersox*, 92 Md. 567, 572-73, 48 A. 1060, 1062 (1901):

It is not because a conveyance or gift is made to husband and wife as joint tenants that the estate by entireties arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and since, in contemplation of the common law, they are but one person, they take, and can only take, not by moieties, but the entirety. The marital relation, with its common law unity of two persons in one, gives rise to this peculiar estate when a conveyance or gift is made to them without restrictive or qualifying words; and they hold as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife. This estate, with its incidents, continues in Maryland as it existed at the common law.

20. *See, e.g.*, *Jordan v. Reynolds*, 105 Md. 228, 66 A. 37 (1907), in which a purchaser of land held by the entirety attempted to escape a contract of sale by arguing that an outstanding judgment against the husband destroyed the ability of the husband and the wife to convey a valid title free from any lien or judgment. The court concluded that the husband's judgment creditor had no lien upon the property and cited MD. CONST. art. III, § 43, which provides that "[t]he property of the wife shall be protected from the debts of her husband." In addition MD. ANN. CODE art. 45, § 1 (1971) provides similar statutory protection. *See* note 55 *infra*.

Maryland statutory provision²¹ which protects a wife's property from the debts of her husband, the court stated that any interest in the entirety gained by a creditor would inhibit the ownership rights of the non-debtor spouse. In support of this position, the court cited *C.I.T. Corp. v. Flint*,²² in which a husband and wife, shortly before the wife's death, jointly conveyed real property held by the entirety to a spendthrift trust for themselves. The husband's judgment creditors attacked the conveyance as fraudulent. The Supreme Court of Pennsylvania found that a judgment creditor of a husband or a wife had no standing to complain of a conveyance of the entirety, which "prevents the property from falling into his grasp."²³

The Court of Special Appeals, after finding that the transfer of the property from Watterson to his wife was a valid conveyance and that Edgerly had no standing to complain, rejected the lower court's finding that Watterson was a settlor of the trust created by his wife's will.²⁴ The court inferred that the trial court's finding was due simply to the relatively short time period between the conveyance, the execution of the will, and the wife's death.²⁵ Reversing the trial court's judgment, the court noted that the creditor was in no worse a position than he would have been had Watterson predeceased his wife or if his wife had lived.²⁶

III. EVALUATION OF THE COURT'S OPINION

After recognizing that *Watterson v. Edgerly*²⁷ presented a question of first impression, the court devoted its opinion almost exclusively to reiterating the rationale of *Hertz v. Mills*²⁸ and the principle that a judgment creditor of an individual spouse cannot attack the conveyance of property held by the entirety.²⁹ The decision also established for the first time in Maryland that the

21. MD. ANN. CODE art. 45, § 1 (1971).

22. 333 Pa. 350, 5 A.2d 126 (1939).

23. *Id.* at 354, 5 A.2d at 129.

24. 40 Md. App. at 238, 388 A.2d at 939.

25. The court stated as follows:

[T]he law does not specify the time frame in which the conveyance may be made, nor does it permit a court to conclude, simply because the wife died within a relatively short period of time from the dates of the conveyance and execution of the will, that the husband is, in fact, the settlor of the trust.

40 Md. App. at 238, 388 A.2d at 939.

26. 40 Md. App. at 238, 388 A.2d at 939. The court alluded to the fact that if Watterson had predeceased his wife, the survivorship nature of the tenancy by the entirety would have passed the entirety to the sole ownership of the wife free from any claims of the husband's individual creditors. See *McCubbin v. Stanford*, 85 Md. 378, 37 A. 214 (1897).

27. 40 Md. App. 230, 388 A.2d 934.

28. 166 Md. 492, 171 A. 709 (1934).

29. See note 14 *supra*.

subject matter of such a conveyance can become the corpus of a spendthrift trust for the grantor's benefit. This result was reached after only one sentence of discussion.³⁰ If the creditor's attack upon the gratuitous conveyance of property held by the entirety from one spouse to the other had been based solely upon the law of fraudulent conveyances, the opinion would be more than sufficient because the court would not have had to consider the effect of the conveyance, only its legality. This was the case in *C.I.T. Corp. v. Flint*,³¹ which the Maryland court cited to clarify its holding. In *Flint*, creditors sued under the Pennsylvania Fraudulent Conveyance Act³² to have a conveyance declared invalid. The Pennsylvania court held that the conveyance was not fraudulent, but pointed out "that it is to be borne in mind that the *legality of the deed does not determine its effect*."³³ In a subsequent action by the same creditor against the property of the trust, the Pennsylvania court held that the husband's life estate in the trust could be reached by his judgment creditors.³⁴ The court's rationale in the later action was that the husband was a settlor of the trust and therefore "the spendthrift provision must be held ineffectual."³⁵ *Flint* has been interpreted as meaning that "the survivorship nature of the interest in a tenancy by the entirety may be sufficient reason for regarding the surviving spouse as the effective creator of the entire trust interest."³⁶

Although the *Watterson* court noted that a person cannot create a valid spendthrift trust for his own benefit,³⁷ a rule followed by all jurisdictions recognizing spendthrift trusts,³⁸ the court failed to investigate fully the possibility that *Watterson* had violated this established principle. It is universally recognized that a person may be the creator of a trust without being the named settlor,³⁹ as where consideration is furnished to a third party for a conveyance to the trustee.⁴⁰ If the person giving the consideration for such a conveyance is a beneficiary of the trust created, no spendthrift

30. 40 Md. App. at 238, 338 A.2d at 939.

31. 333 Pa. 350, 5 A.2d 126 (1939).

32. PA. STAT. ANN. tit. 39, §§ 351-63 (Purdon 1954).

33. 333 Pa. at 355, 5 A.2d at 129 (emphasis added).

34. *Murphy v. C.I.T. Corp.*, 347 Pa. 591, 33 A.2d 16 (1943).

35. *Id.* at 593, 33 A.2d at 18.

36. E. GRISWOLD, SPENDTHRIFT TRUSTS § 491.1 (2d ed. 1947).

37. 40 Md. App. at 232, 388 A.2d at 936. *See, e.g.*, *Mauders v. Mercantile Trust & Deposit Co.*, 147 Md. 448, 128 A. 145 (1925); *Brown v. McGill*, 87 Md. 161, 39 A. 613 (1898).

38. *See generally* A. SCOTT, THE LAW OF TRUSTS § 156 (3d ed. 1967). The rationale for this prohibition is based upon the policy that a person should not be allowed the beneficial use of his property while it is held in trust beyond his creditors' reach. E. GRISWOLD, SPENDTHRIFT TRUSTS § 491 (2d ed. 1947).

39. RESTATEMENT (SECOND) OF TRUSTS § 156, Comment f (1959). *Accord*, *Security Trust Co. v. Sharp*, 32 Del. Ch. 3, 77 A.2d 543 (1950).

40. *See generally* E. GRISWOLD, SPENDTHRIFT TRUSTS § 487 (2d ed. 1947). *See, e.g.*, *State v. Nashville Trust Co.*, 28 Tenn. App. 388, 190 S.W.2d 785 (1944).

provision will be effective to bar his creditors from reaching his interest in the trust.⁴¹ To determine what constitutes the giving of consideration for conveyance by another to a spendthrift trust, courts have developed several specialized rules.⁴² For example, paying off encumbrances on trust property,⁴³ surrendering curtesy or other marital property interests,⁴⁴ or settling will contests and other legal disputes⁴⁵ have been held to be acts furnishing consideration. Despite these specialized rules, however, no universally accepted test for determining what constitutes the giving of consideration has evolved from the long line of cases which have considered the issue.⁴⁶ In *Murphy v. C.I.T. Corp.*,⁴⁷ however, in which the Supreme Court of Pennsylvania was faced with a joint conveyance of property held by the entirety to a spendthrift trust, the court found that the conveyance of the husband's interest in the entirety to the trustee was consideration for the establishment of the trust.⁴⁸ The court so held despite the argument that it would be possible to find that the wife was the sole settlor of the spendthrift trust.⁴⁹

The facts of *Murphy* closely parallel the facts of *Watterson*, the only difference being that there was an initial conveyance from Watterson to his wife prior to her creation of the spendthrift trust in his favor.⁵⁰ When Watterson conveyed his interest in the entirety to his wife, he surrendered his right of survivorship in the entirety.⁵¹ This surrender of Watterson's right of survivorship could be viewed

41. See, e.g., *Brillhart v. Mish*, 99 Md. 447, 58 A. 28 (1904); *Warren v. Rice*, 66 Md. 436, 8 A. 84 (1887). See generally G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 223 (rev. 2d ed. 1979).

42. See generally 2 A. SCOTT, *THE LAW OF TRUSTS* § 156 (3d ed. 1967).

43. See *Gilkey v. Gilkey*, 162 Mich. 664, 127 N.W. 715 (1910).

44. Compare *Davis v. Davis*, 138 Va. 682, 123 S.E. 538 (1924) (person electing to take a trust interest under a will instead of a right of dower held to have furnished consideration) with RESTATEMENT (SECOND) OF TRUSTS § 156, Comment f (1959) (no presumption should arise simply because a spouse waives "a right to insist on dower or curtesy or a statutory distributive share" of the deceased spouse's estate).

45. *Johnson v. Stringer*, 158 Md. 315, 148 A. 447 (1930).

46. See generally Behrends, *Liability Under Trusts to Creditors of Trustor*, 30 So. CALIF. L. REV. 75 (1929); Note, *Utility of Tests for Ascertaining the Settlor of an Express Trust*, 30 COLUM. L. REV. 216 (1930).

47. 347 Pa. 591, 33 A.2d 16 (1943).

48. *Id.* at 593, 33 A.2d at 18.

49. E. GRISWOLD, *SPENDTHRIFT TRUSTS* § 491 (2d ed. 1947).

50. In *Murphy* the husband and wife conveyed the entirety to a spendthrift trust by a joint act, and therefore there was no conveyance from the husband to the sole ownership of his wife.

51. The survivorship nature of an estate held as a tenancy by the entirety is well established in Maryland. See, e.g., *Brewer v. Bowersox*, 92 Md. 572, 573, 48 A. 1060, 1062-63 (1901).

as consideration for the establishment of the spendthrift trust.⁵² Without this conveyance by Watterson, the survivorship nature of the entirety would have passed sole ownership of the property to Watterson upon his wife's death. Therefore, without this conveyance, the wife's testamentary creation of the spendthrift trust would have been impossible.

It has been suggested that courts should abandon the attempt to establish mechanical methods for determining the settlor of the spendthrift trust and "that it is more expedient to look merely at the issue in any given case and at the policy involved therein, with a view to ascertaining the one to be affected by the legal consequences ensuing from the adjudication of that issue alone."⁵³ The policy considerations discussed in *Watterson v. Edgerly* focused primarily upon the property rights of the wife.⁵⁴ The court correctly interpreted Maryland statutory law when it refused to formulate a holding that would affect the wife's ability to convey her interest in the entirety free from her husband's debts.⁵⁵ The opposing policy consideration, however, that a person should not be allowed to derive income and benefit from assets he has placed beyond the reach of his creditors,⁵⁶ was not discussed. If the *Watterson* court had followed the Pennsylvania court in *Murphy*, it could have protected the wife's property rights at the same time it protected the rights of the husband's creditors. The Maryland court, like the Pennsylvania court, could have held that the interspousal conveyance was valid and that the wife had every legal right to establish the testamentary trust, but that the trust spendthrift provision was invalid and that the husband's judgment creditors could reach his life interest in the

52. Cf. E. GRISWOLD, SPENDTHRIFT TRUSTS §491.1 (2d ed. 1947) (This section analyzed the Pennsylvania court's holding in *Murphy* as meaning that the survivorship interest in a tenancy by the entirety is a property right and that the surrender or conveyance of this right may be deemed sufficient consideration for the creation of a trust. Thus the party surrendering a survivorship interest in an entirety may be regarded as the settlor of a spendthrift trust containing the property of the entirety.).

53. Note, *Utility of Tests for Ascertaining the Settlor of an Express Trust*, 30 COLUM. L. REV. 216, 225 (1930).

54. 40 Md. App. at 366-67, 388 A.2d at 938-39.

55. MD. ANN. CODE art. 45, §1 (1971) provides that "[t]he property, real and personal, belonging to a woman at the time of her marriage, and the property which she may acquire or receive after her marriage . . . shall be protected from the debts of the husband, and not, in any way be liable for the payment thereof." For an application of the same statutory language, see *Hertz v. Mills*, 166 Md. 492, 171 A. 709 (1934).

Any interpretation of this statute which would allow a husband's creditor standing to complain about the conveyance of a tenancy by the entirety would inhibit the wife's ownership rights. If the creditor had standing, the wife would not be able to pass the title to her property free and clear of her husband's debts. See note 19 *supra*.

56. See, e.g., *Brillhart v. Mish*, 99 Md. 447, 58 A. 28 (1904); *Warner v. Rice*, 66 Md. 436, 8 A. 84 (1887). See generally RESTATEMENT (SECOND) OF TRUSTS §156 (1959).

estate. A judicial determination that a spendthrift provision is invalid does not result in the destruction of the trust, but only in the destruction of the spendthrift provision.⁵⁷ Thus, if the spendthrift provision of Mrs. Watterson's will had been declared invalid, her disposition would have remained unchanged as to the remaindermen of the trust.⁵⁸ The only parties affected by such a holding would have been the husband, who would have been forced to pay his creditors, and the creditors, whose debts would have been at least partially satisfied.

The effect of *Watterson v. Edgerly* is difficult to predict. It may be surmised that any spouse holding property by the entirety who faces individual judgment creditors will rush to convey his property interest in the entirety to the other spouse, with instructions to the transferee to create a will giving the transferor a trust interest protected by a spendthrift provision. This would be an attractive course of action for the indebted spouse because it would remove the possibility of the entirety passing to his sole ownership, without protection from his creditors, if the spouse who is free from debt predeceased him.⁵⁹ Of course, this maneuver would mean that the spouse making the transfer would surrender complete control and ownership to the other spouse, which might create hesitation in many potential transferors. Other considerations that might cause hesitancy would be the possibility of divorce, and that the transfer would strip the property of the protective aspects of the tenancy by the entirety and thus subject it to attachment by any future creditors of the transferee. Even recognizing these real and practical limitations upon the potential effect of the *Watterson* holding, however, it is foreseeable that a debtor spouse, who is faced with judgment creditors holding unsatisfied claims exceeding his interest in property held by the entirety, may decide to follow the route sanctioned by *Watterson*. After all, if divorce occurs, the protection

57. See, e.g., *Murphy v. C.I.T. Corp.*, 347 Pa. 591, 593, 33 A.2d 16, 18 (1943). See generally RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).

58. Mrs. Watterson's testamentary trust gave her husband only a life estate in the trust corpus. Upon her death an immediate, beneficial interest in the trust corpus became vested in the remaindermen with use and possession postponed until Mr. Watterson's death. Thus, the invalidation of the spendthrift provision would have meant that Watterson's creditors could attach only his life estate. Upon Mr. Watterson's death, his life estate would end and the remaindermen would take immediate possession of the trust corpus without personal encumbrances.

This result was reached in *Murphy v. C.I.T. Corp.*, 347 Pa. 591, 33 A.2d 16 (1943), in which the creditors of the surviving spouse were permitted to reach only his life estate when he was determined to be the settlor of a spendthrift trust for his own benefit which gave the remainder of the trust estate to his daughters.

59. Upon the death of either spouse, the survivorship nature of the tenancy by the entirety passes the entire estate to the sole ownership of the surviving spouse. See *McCubbin v. Stanford*, 85 Md. 378, 390, 37 A. 214, 214 (1897).

of the tenancy by the entirety disappears⁶⁰ and his creditors will execute upon his joint interest. If the recipient spouse fails to perform his agreement to create the testamentary spendthrift trust, the betrayed spouse can elect to take his intestate portion of the estate, and thus regain most of the loss.⁶¹ The only remaining danger to an indebted spouse in utilizing the *Watterson* holding would be an inter vivos conveyance by the spouse possessing sole ownership of the former entirety. This occurrence would merely accelerate the inevitable loss of the property that would occur upon divorce, or upon the death of the non-indebted spouse.

When the preceding considerations are fully explored, it seems predictable that the holding in *Watterson v. Edgerly* will be employed to help married debtors evade their legally enforceable debts. Thus, spendthrift trusts in Maryland may be utilized in a manner which allows the settlor to enjoy the use and income of his own property during his lifetime to the exclusion of his judgment creditors.

IV. CONCLUSION

The decision in *Watterson v. Edgerly* continues the Maryland tradition of holding a wife blameless for judgments rendered against her husband. It neglects, however, to consider the effect of providing a debtor-spouse with a method of avoiding judgment creditors that benefits no one but the debtor himself. The court should allow an incursion into a spouse's testamentary dispositive power when the incursion is limited to the equitable goal of reaching the surviving spouse's interest in order to ensure that a debtor-spouse does not enjoy his own property, while his judgment creditor is barred from executing upon the property.

The sole justification of the spendthrift trust is that creditors of a spendthrift beneficiary have no rights superior to those of the trust settlor to dispose of his property as he sees fit. This justification disappears when the settlor is also a spendthrift beneficiary. In this

60. Upon an absolute divorce the tenancy by the entirety ceases and the parties hold the estate as tenants in common. Thereafter the property interest of either spouse is subject to the claims of creditors. See *Columbia Carbon Co. v. Knight*, 207 Md. 203, 210, 114 A.2d 28, 32 (1954) (dictum); *Meyers v. East End Loan & Sav. Ass'n*, 139 Md. 609, 116 A. 453 (1922).

61. Md. EST. & TRUSTS CODE ANN. § 3-102(b) (Supp. 1978).

The remedy of specific performance would not be available to the damaged spouse because he would have to show that the conveyance of his interest in the entirety was the consideration he gave for the agreement he wishes enforced. See note 52 *supra*. Thus the spouse requesting specific performance would be forced to place himself in the position of the settlor of the trust in his pleading. This would result in the invalidation of the spendthrift provision and leave his interest in the trust open for execution by his creditors.

circumstance, the issue is no longer an assignment of priority between a gratuitous grantor and a creditor of the beneficiary, but is rather the assignment of priority between a debtor's interest in his property and a judgment creditor's right to have his judgment satisfied. Thus, when it is possible to trace the contribution of a person to the establishment of a spendthrift trust and to determine that the person is deriving a pecuniary benefit from the trust, the spendthrift provision should be held invalid and the interest of that person should be made available for execution by his judgment creditors.

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